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In the Supreme Court of the United States

OCTOBER TERM, 1971

AIDA GUZMAN DE FONT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the wife and child of a deceased serviceman. They instituted the present action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674, seeking damages resulting from the serviceman's death on the ground that it had been caused by negligent medical treatment at various Army hospitals. The district court (Pet. App. B) dismissed the suit on the authority of *Feres* v. *United States*, 340 U.S. 135; the court of appeals affirmed *per curiam* (Pet. App. A).

In *Feres*, this Court held that the government is not liable under the Federal Tort Claims Act for injuries to servicemen which arise out of or are in the course of activities incident to service. Decedent's injuries were admittedly sustained in this manner. Petitioners contend here, however, as they did below, that the incident-to-service limitation in *Feres* is not applicable in this case since they are not themselves servicemen and the suit was brought to recover damages that they personally suffered.

The contention was properly rejected by both courts below. It is not the status of the person seeking recovery that determines liability; it is the nature of the underlying facts relating to the injury. As this Court pointed out in *Feres* (340 U.S. at 145), the "typical" service-connected suits under the Tort Claims Act have been suits brought "by widows or surviving dependents." Every court of appeals that has considered the question, including the present one, has held that recovery by such claimants is subject to the same limitation, *i.e.*, that the injuries on which the claim is based not be sustained as an incident to service. See, *e.g.*, *Van Sickel* v. *United States*, 285 F.2d 87 (C.A. 9); *Orken* v. *United States*, 239 F.2d 850 (C.A. 6); *Norris* v. *United States*, 137 F. Supp. 11, affirmed *per curiam*, 229 F.2d 439 (C.A. 2); *Archer* v. *United States*, 217 F. 2d 548 (C.A. 9), certiorari denied, 348 U.S. 953; *Dilworth* v. *United States*, 387 F.2d 590 (C.A. 3); *Shults* v. *United States*, 421 F.2d 170 (C.A. 5); *Buckingham* v. *United States*, 394 F.2d 483 (C.A.

4); *United States* v. *Lee*, 400 F.2d 558 (C.A. 9), certiorari denied, 393 U.S. 1053.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[1] Petitioners raised for the first time in the court of appeals a claim of damages based on the alleged mental anguish of the wife resulting from her observations of the inadequate care given to her husband. To the extent that such a claim has also been made in the present petition, it is not properly before this Court since, as the court of appeals indicated (Pet. App. A, p. 11), it was not "adequately specified and damages claimed therefor." In any event, we agree with the court below that such a claim of mental anguish "would not remove the incident-to-service limitation of *Feres*" (*ibid.*).

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